

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

John F. Ahearne, Chairman  
Victor Gilinsky  
Richard T. Kennedy  
Joseph M. Hendrie  
Peter A. Bradford



In the Matter of )  
EDLOW INTERNATIONAL COMPANY )  
(Agent for the Government of India )  
on Applications to Export Special )  
Nuclear Materials and Components )

License Nos. XSNM-1379  
XSNM-1569  
XCOM-0240  
XCOM-0250  
XCOM-0376  
XCOM-0381  
XCOM-0395

MEMORANDUM AND ORDER

CLI-80-18

Edlow International Company, as agent for the Government of India, filed the following license applications <sup>1/</sup> with the Commission seeking authorization to export material and components for use in the Tarapur Atomic Power Station (Tarapur) located near Bombay, India:

- (1) XSNM-1379 on November 1, 1977 for export of 487.3 kilograms of U-235 contained in 19,858.8 kilograms of uranium enriched to a maximum of 2.7%;
- (2) XCOM-0240 on April 25, 1979, as amended May 8, 1980, for export of replacement parts;
- (3) XCOM-0250 on May 7, 1979 for export of replacement parts;
- (4) XSNM-1569 on August 17, 1979 for export of 487.3 kilograms of U-235 contained in 19,858.8 kilograms of uranium enriched to a maximum of 2.71%;

<sup>1/</sup> A brief chronology of correspondence on these applications is attached.

- (5) XCOM-0376 on March 6, 1980 for export of replacement parts;
- (6) XCOM-0381 on March 14, 1980 for export of replacement parts;  
and
- (7) XCOM-0395 on April 3, 1980 for export of replacement parts.

The lengthy history of U.S.-Indian cooperation in connection with the Tarapur reactors is fully chronicled in several formal Commission decisions. <sup>2/</sup>

The Commission cannot find, based on a reasonable judgment of the assurances provided by the Government of India and other information available, that License Applications XSNM-1379, XSNM-1569, XCOM-0240, XCOM-0250, XCOM-0376, XCOM-0381 and XCOM-0395 meet the criteria for issuance set forth in Sections 109, 127, and 128 of the Atomic Energy Act. Accordingly, NRC is referring these license applications to the President, pursuant to procedures set forth in Section 126b.(2) of the Atomic Energy Act.

The basis for the Commission's decision is as follows. India has several nuclear facilities which have not been placed under International Atomic Energy Agency safeguards. After reviewing the legislative history of Section 128 of the Atomic Energy Act, the Commission has concluded that the full-scope safeguards criterion applies to the two fuel applications. The legislative history of the Nuclear Non-Proliferation Act is replete with references that the full-scope safeguards criterion would come into effect at a date certain <sup>3/</sup> -- that

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<sup>2/</sup> CLI-76-10, 4 NRC 1 (1976); CLI-76-6, 3 NRC 563 (1976); CLI-77-20, 5 NRC 1358 (1977); CLI-78-8, 7 NRC 436 (1978); CLI-78-20, 8 NRC 675 (1978); CLI-79-4, 9 NRC 209 (1979).

<sup>3/</sup> E.g., H. Rep. No. 95-587, 95th Cong., 1st Sess. at 22, 25; S. Rep. No. 95-467, 95th Cong. 1, 1st Sess. at 18; Statement of Senator Glenn, 123 Cong. Rec. S.13139 (July 29, 1977).

the application of the criterion would have a "guillotine" effect. <sup>4/</sup> The State Department's view that the criterion does not apply to license applications filed before September 10, 1979 where the applicant reasonably expected the license to issue prior to March 10, 1980 is, we believe, inconsistent with Congressional intent. As we understand the Department's view, if an application were filed with the Commission prior to September 10, 1979, an applicant expected the license before March 10, 1980, but the Executive Branch did not provide the Commission with its views until years later, the criterion would not apply. Such results do not comport with the "guillotine" approach which was contemplated.

Because of unique features in the Agreement for Cooperation between the United States and India, the Commission is also unable to find that the two fuel applications satisfy the requirements of Section 127 of the Atomic Energy Act or that the component applications satisfy the requirements of Section 109 of the Atomic Energy Act. This issue is thoroughly discussed in earlier Commission opinions. <sup>5/</sup>

The Commission's inability to issue these licenses should not be read as a recommendation one way or the other on the proposed exports. Rather, we have found that the particular statutory findings with which the NRC is charged cannot be made. Congress provided that the President may in such a case authorize the export by executive order if he finds "that withholding the proposed export

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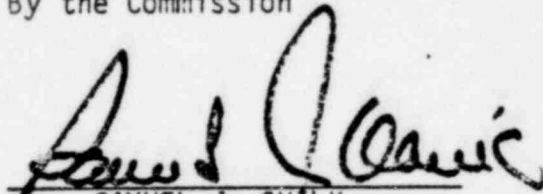
<sup>4/</sup> Testimony of Joseph Nye, Deputy Undersecretary of State for Security Assistance, Science and Technology, before the Subcommittees on International Security and Scientific Affairs, and on International Economic Policy and Trade of the House Committee on International Relations, 95th Cong., 1st Sess., at 118 (May 19, 1977).

<sup>5/</sup> CLI-78-8, 7 NRC 436 (1978); CLI-79-4, 9 NRC 209 (1979).

would be seriously prejudicial to the achievement of United States non-proliferation objectives, or would otherwise jeopardize the common defense and security."\*

It is so ORDERED.

By the Commission



SAMUEL J. CHILK  
Secretary of the Commission

Dated at Washington, D.C.

this 16<sup>th</sup> day of May, 1980.

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\* Section 201 of the Energy Reorganization Act, 42 U.S.C. 5841, provides that action of the Commission shall be determined by a "majority vote of the members present." Commissioner Kennedy was not present at the meeting at which this Order was approved. Had he been present he would have voted to approve this Order. Accordingly, the formal vote of the Commission is 4-0.

## Chronology of Events

- On March 28, 1979, Louis V. Nosenzo, Deputy Assistant Secretary of State sent a letter to James R. Shea, Director, Office of International Programs, U.S. Nuclear Regulatory Commission, which contained an Executive Branch analysis on XSNM-1379. The Executive Branch concluded that all applicable export licensing criteria were met and recommended issuance of XSNM-1379. Shortly after receiving this submission, the NRC posed additional questions to the Executive Branch regarding India's nuclear programs and policies. The Department of State forwarded its response to the NRC on July 5, 1979. On August 15, 1979, the Commission noted changes in the leadership of the Government of India and requested an Executive Branch assessment of the impact of these developments on the Executive Branch analysis of XSNM-1379. In its letter the NRC noted its intention to defer final consideration of XSNM-1379 and two component cases (XCOM-0240 and 0250) until receiving a response to this inquiry. On October 19, 1979, the Commission sent a letter to the Department of State noting that it had not received a response to the questions raised in the August letter and requesting that the Executive Branch include an assessment of the leadership changes in its views on License Application XSNM-1569, which was then pending in the Executive Branch. On May 7, 1980, the Executive Branch in a letter from Louis V. Nosenzo to James R. Shea provided responses to the Commission's August 15 questions and provided its views on XSNM-1569. The Executive Branch concluded that XSNM-1569 met all applicable criteria for issuance and recommended issuance of the license.
- In a letter from Louis V. Nosenzo to James R. Shea, dated June 11, 1979, the Executive Branch concluded that XCOM-0240 met all applicable licensing criteria and recommended issuance of the license.
- In a letter from Louis V. Nosenzo to James R. Shea, dated October 22, 1979, the Executive Branch concluded that XCOM-0250 met all applicable licensing criteria and recommended issuance of the license.
- In three separate letters from Louis V. Nosenzo to James R. Shea, dated May 13, 1980, the Executive Branch concluded that XCOM-0376, 0381, and 0395 met all applicable licensing criteria and recommended issuance of these licenses.

Chairman Ahearne's Concurring Views

In March 1979 I found that a license application for export of fuel to India for use in Tarapur met the Section 127 criteria and concurred in the Commission's decision to authorize that export.<sup>1/</sup> In connection with that decision I made the following statements:

"If there had been no indications of progress towards U.S. non-proliferation goals, I would find that to weigh in favor of denial. The fact that some progress has been made weighs in the other direction.

...

"The current Government of India has taken truly significant steps to meet these proliferation goals. India is the only country that having exploded a nuclear device, has turned away from nuclear weapons, and has demonstrated the ability to make the difficult choice of not continuing down that path. Although the previous government was certainly not supportive of non-proliferation policy and acted in a manner which was inimical, the present government has done just the opposite--it has acted responsibly and courageously."  
(Id. at 250)

Since that decision, Mr. Desai has departed and Mrs. Gandhi has been elected Prime Minister. No progress has been made in achieving full scope safeguards and Prime Minister Gandhi "has not ruled out the option of so-called peaceful nuclear experiments, should this be considered to be in India's interest."<sup>2/</sup>

Consistent with my reasoning in the previous case, I can no longer find that the criteria in Section 127 are met. In addition, I do not agree with the Executive Branch's interpretation that the March 10, 1980 deadline for full-scope safeguards meant only that the applicant intended to ship the material prior to the deadline. Consequently, I cannot find that the Section 128 criterion has been met. Finally I cannot find that the criteria in Section 109 are met for the same reasons I cannot find that the corresponding criteria in Section 127 are met.

Consequently, I agree we should forward these applications to the President for his consideration.

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- 1/ Edlow International Company (Agent for the Government of India on Application to Export Special Nuclear Materials), CLI-79-4, 9 NRC 209, 230-50 (1978) (separate views of Commissioner Ahearne).
  - 2/ May 7, 1980 letter from Louis V. Nosenzo, Deputy Assistant Secretary of State, to James R. Shea, Director, Office of International Programs, U.S. Nuclear Regulatory Commission (providing the Executive Branch response to NRC's August 15, 1979 inquiry concerning the impact of the change in government on the prior Executive Branch analysis).

SEPARATE OPINION OF COMMISSIONER GILINSKY

This decision involves, primarily, two export license applications for fuel shipments for the Tarapur Atomic Power Station. 1/ These applications, on which the NRC is acting after the expiration of a two-year grace period provided by the Nuclear Nonproliferation Act, are subject to the requirement of Section 128 of the Atomic Energy Act that international safeguards apply to all nuclear facilities in the receiving country. 2/ India has rejected such full-scope safeguards.

In recommending approval of these applications, the Department of State has informed the Nuclear Regulatory Commission that "[i]f the NRC does not act favorably, the President is prepared to authorize the export by Executive Order." 3/ There is reason to believe, on the basis of the Department of State's presentation to NRC, that the Department, prior to submitting these license applications to NRC, assured the President that Section 128's full-scope safeguard requirement is not applicable to these particular fuel exports, and that the President, in authorizing public comment on his intention, relied on that opinion.

The Nuclear Regulatory Commission disagrees with the Department of State's interpretation. 4/ The export can take place only if the President grants a waiver from this requirement of the law and if Congress allows that waiver to stand. The law requires the President,



in granting the waiver, to find that failure to approve the export "would be seriously prejudicial to the achievement of the United States non-proliferation objectives, or would otherwise jeopardize the common defense and security...." 5/

It is an unfortunate accident of history that these license applications have come under consideration at a time when the international situation is thought to require a serious compromise of our long-term security objective of preventing the spread of nuclear weapons. 6/ It would be even more unfortunate, however, if the decision to except India from this central provision of the Nuclear Non-proliferation Act were made without a full understanding of the price we may be forced to pay.

Full scope safeguards are the sine qua non of the Nuclear Non-proliferation Act. 7/ If a waiver is in fact granted by the President, and if it is upheld by the Congress, the law will be gravely impaired. If India does not need to satisfy the full-scope safeguards requirement, other countries will be quick to seek similar exemptions, with the inevitable erosion of the law's effectiveness.

There are other difficulties with the export. For reasons which have been spelled out in prior opinions, and which apply with even greater force now, these fuel shipment applications also fail to satisfy the requirements of Section

127 of the Act. 8/ In relevant part, Section 127 requires a pledge that IAEA safeguards will be applied to any material or facilities proposed to be exported or previously exported, that no material or facility will be used for any nuclear explosive device or for research on or development of any such device, and that no material will be reprocessed without the prior approval of the United States. India has made it clear that if there is any halt, or perhaps even lapse, in the supply of fuel for the Tarapur reactors, it will consider itself free of the contractual obligations of the Agreement for Cooperation and at liberty to reprocess as it sees fit the 200 tons of fuel it already holds hostage. 9/ It has not excluded making explosive use of the more than one ton of plutonium that can be separated from the U.S.-supplied fuel. 10/ .

Commissioner Bradford is in basic agreement with the points made in this opinion.

FOOTNOTES

1/ XSNM-1379 and XSNM-1569.

2/ 42 U.S.C. Section 2157 which provides that "[a]s a condition of continued United States export of... special nuclear material...to non-nuclear-weapon states, no such export shall be made unless IAEA safeguards are maintained with respect to all peaceful nuclear activities in, under the jurisdiction of; or carried out under the control of such state at the time of the export...."

3/ Press Correction issued on May 9, 1980 by Deputy Assistant Secretary of State, Louis V. Nosenzo.

The Nuclear Nonproliferation Act contemplates that the President can respond to the Commission's findings in one of two fashions: he can, after receiving the views of both the Executive Branch and the NRC, determine that a waiver of the Act's requirements is necessary or he can, prior to submitting the application to the NRC, announce that he is granting an exemption from the full-scope safeguards requirement and ask the NRC to consider only the other applicable provisions of law. In the present case, the Department of State has placed the Administration in the position of ignoring NRC's views on the applicability of Section 128 to these exports without regard to what these views might be.

4/ The Commission has rejected the Department of State argument that the applicability of the full-scope safeguards requirement depends not on when an export occurs but on when the exporter would have liked it to take place for the reasons set forth in the attached opinion of the General Counsel. "Application of Sections 127 and 128 of the Atomic Energy Act to Proposed Exports to India," memorandum of the General Counsel to the Commission, May 12, 1980.

5/ Section 126(b)(2) of the Atomic Energy Act, 42 U.S.C. Section 2155.

- 6/ It should be noted that the present fuel shipments are not immediately necessary to the continued operation of the Tarapur reactors. I understand that India already has sufficient fuel on hand to continue operation of these reactors until the beginning of 1983. If the President grants a waiver from the full-scope safeguards requirement for these two shipments, India will have sufficient fuel to operate the Tarapur reactors until about 1985. In this connection, it should be noted that the Senate section-by-section analysis of Section 128 states that "[t]he NRC should also not permit any other highly unusual proposals which are intended to circumvent this statutory provision." (S. Rep. No. 95-467, 95th Cong., 1st Sess., at 18.)
- 7/ In its Comments to the Senate Committee on Energy and Natural Resources, the Executive Branch stated that full-scope safeguards were of "...crucial and pivotal importance...to an effective non-proliferation policy..." (S. Rep. No. 95-467, 95th Cong., 1st Sess., at 49.). The House report termed the full-scope safeguards requirement "indispensable to any comprehensive nuclear antiproliferation policy:" (H. Rep. No. 95-587, 95th Cong., 1st Sess. at 25.)
- 8/ 42 U.S.C. Section 2156. See the views I expressed in Edlow International Company, CLI-79-4, 9 NRC 209 (1979), at 250 (attached).
- 9/ Letter of May 7, 1980 from Deputy Assistant Secretary of State, Louis V. Nosenzo to James R. Shea, Director of International Programs, United States Nuclear Regulatory Commission.
- 10/ Letter of May 7, 1980 from Deputy Assistant Secretary of State, Louis V. Nosenzo to James R. Shea, Director of International Programs, United States Nuclear Regulatory Commission.